

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

DENMAN KOUNTZE JR., as President and)
Trustee of the Gilbert M. and Martha)
H. Hitchcock Foundation, a nonprofit)
corporation,)
)
Plaintiff,)
)
vs.)
)
)
TYLER B. GAINES, NEELY KOUNTZE,)
MARY KOUNTZE, JOHN WEBSTER,)
W. RUSSELL BOWIE, THOMAS R. BURKE,)
LAMSON, DUGAN & MURRAY, and)
GILBERT M. AND MARTHA H. HITCHCOCK)
FOUNDATION,)
)
Defendants.)
)

8:04CV616

SCHEDULING ORDER

This matter is before the magistrate judge for full pretrial supervision. On August 24, 2005, Judge Smith Camp filed an Amended Memorandum and Order (#44) finding, *inter alia*, that Denman Kountze, Jr. had Article III standing and the right to file this derivative suit pursuant to Neb. Rev. Stat. §21-1949 (Reissue 1997); the Gilbert M. and Martha H. Hitchcock Foundation should be aligned as a defendant; and this court has diversity jurisdiction pursuant to 28 U.S.C. 1332.

On August 31, 2005, counsel served notice (#45) that plaintiff, Denman Kountze, Jr., died on August 25, 2005. The Notice of Death confirms that this lawsuit was brought in a representative capacity. Thus, under Nebraska law, the decedent's Personal Representative cannot continue the action. Nebraska law, Neb. Rev. Stat. § 21-1918, further requires that the Nebraska Attorney General be notified of the pendency of these proceedings and the occurrence of the plaintiff's death, due to the public interest in the charitable work provided by the Hitchcock Foundation. The Nebraska Attorney General may take appropriate action including, but not limited to, seeking injunctive relief or intervening as of right in this proceeding. § 21-1918.

IT THEREFORE IS ORDERED

1. Plaintiff's counsel, David A. Domina, shall inform the Nebraska Attorney General of the ruling and deadline set out in Judge Smith Camp's August 24, 2005 order (#44).

2. On or before **September 12, 2005**, Mr. Domina shall file a certificate of service showing compliance with paragraph 1, above, and listing the names and addresses of the persons to whom the information was sent.
3. The Nebraska Attorney General is given until **September 30, 2005** to either
 - (a) file a motion seeking the substitution of the Nebraska Attorney General as a party to this case or
 - (b) file a written notice that the Attorney General declines to take any action pursuant to Neb. Rev. Stat. § 21-1918.
4. All discovery and scheduling order deadlines previously set in Order #41 are hereby stayed until further order of the court.

DATED September 1, 2005.

BY THE COURT:

**s/ F.A. Gossett
United States Magistrate Judge**